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## EXHIBIT 5

11-25

IN THE SUPERIOR COURT OF RICHMOND COUNTY

STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A.,  
P.C., individually and on behalf of all  
persons and entities similarly situated,

Plaintiffs,

v.

STAPLES, INC., and QUICK LINK  
INFORMATION SERVICES, INC.,

Defendants.

CIVIL ACTION FILE  
NO. 2003-RCCV-728

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RICHMOND COUNTY, GA

**BRIEF OF DEFENDANT STAPLES, INC. AND QUICK LINK INFORMATION  
SERVICES, LLC IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

NOW COME Staples, Inc. ("Staples") and Quick Link Information Services, LLC ("Quick Link"), Defendants in the above-styled case, and move to dismiss the instant action as follows:

**I. INTRODUCTION**

This is an action under the Telephone Consumer Protection Act of 1991 and various state law theories of liability based on the transmittal of a facsimile from Quick Link, on behalf of Staples, to Plaintiff. Plaintiff Mattison R. Verdery, C.P.A., P.C. ("Plaintiff" or "Verdery") was indisputably an established and regular customer of Staples, an office supply retailer which conducts business nationwide and in Richmond County. He provided his facsimile number to Staples and neither expressed nor was told of any restrictions on its use.

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Over the past eleven-plus years, the government agency charged with administering regulations on facsimile advertising, the Federal Communications Commission ("FCC"), has held that transmissions of facsimile advertisements to customers such as Plaintiff are permitted under the law. Plaintiff, undeterred, seeks to hold Staples and Quick Link liable for their good-faith compliance with the regulations of the FCC. Upon receipt of the facsimile at issue in this case (the "Facsimile"), instead of petitioning the FCC to change its rules or petitioning Congress to change the laws, Plaintiff has sought compensatory damages, attorneys' fees and punitive damages and seeks class action certification for all who received a facsimile advertisement from Staples over the four years preceding the filing of his Complaint.

## **II. STATEMENT OF FACTS**

1. Verdery admits that he had an extensive business relationship with Staples over the years preceding his receipt of the Facsimile.

In his deposition, Verdery admitted that he extensively transacted business with Staples in the years and months leading up to his receipt of the Facsimile in March 2003. Verdery admitted that he bought products from Staples approximately 12 times per year, and was a member of the Staples Business Rewards program. [Verdery Depo., Tr. pp. 7:13 to 7:21, 8:6 to 8:17, 12:14 to 13:18, 14:9 to 17:25, 22:16 to 22:22, 24:15 to 24:20]. Plaintiff testified, in relevant part:

**Q. Approximately how often do you have business transactions with Staples?**

**A. Like I said, they are right across the street. So probably once - - maybe 12 times a year or so.**

**Q. And prior to receipt of the facsimile [at issue] in this litigation, had you done business transactions with Staples at that rate, 12 times per year?**

A. That's approximate. Probably so. From the time they moved - - I mean, before that, I probably used Office Depot because they were the closest one. So, I don't recall exactly when that store was built up in there.

Q. So, once the store in Augusta opened, the Staples store, you began doing business with Staples 12 times per year, correct?

A. Correct, approximate.

Q. And each time you did business with Staples, you entered a contract with them to purchase their products in exchange for paying them on a credit card or by cash, correct?

A. I guess it's a contract. I don't know. I entered into a transaction with them, yes.

Q. Well, by which you agreed to buy their product and they agreed to sell you their product, correct?

A. Yes.

\* \* \*

Q. How many times prior to the receipt of the facsimile in this litigation would you estimate that you called Staples?

A. Probably two times, two to three times a year maybe. Out of that total we estimated 12, probably two or three of those are telephone and the rest are going over there and picking up something.

[Verdery Depo., Tr. pp. 16:23 to 17:25, 22:16 to 22:22]. When questioned about a Staples printout showing Plaintiff's multiple transactions since the year 2000, Plaintiff admitted that it appeared to be a correct listing of his transactions with Staples. [Verdery Depo., Tr. p. 24:15 to 24:20].

Plaintiff admitted that prior to the receipt of the Facsimile, he had never attempted to sever his business relationship with Staples in any way:

Q. Prior to receipt of the fax which is at issue in this litigation, did you ever at any time ever do anything to sever your relationship with Staples?

A. No, not that I recall.

[Verdery Depo., Tr. p. 16:18 to 16:22].

2. Plaintiff provided his facsimile number to Staples without any restrictions on its use.

Verdery applied for and received membership in the Staples Business Rewards program and also received a Staples customer number in connection with his placement of telephone orders. [Verdery Depo., Tr. pp. 8:6 to 8:17, 12:14 to 13:18, 15:11 to 16:9]. While placing one or more of those telephone orders, Verdery provided Staples with his facsimile number. [Affidavit of Peter Howard]; [Verdery Depo., Tr. pp. 12:14 to 13:18].

Verdery testified that when he gave his facsimile number to Staples, he did not express any restrictions on its use:

**Q. Do you recall ever inquiring to Staples as to what they would do with your fax number if you gave it to them?**

**A. No.**

\* \* \*

**Q. Was there any representation that you relied on from Staples that that's all they would do with your personal information which they obtained in connection with your customer number?**

**A. I don't recall them giving me a representation.**

\* \* \*

**Q. Prior to receipt of the facsimile in this litigation, did you ever do anything to indicate to Staples that you did not want to receive facsimiles from Staples?**

**A. Did I expressly fill out something saying I didn't want, is that what your question is?**

**Q. Correct.**

**A. Not that I recall.**

**Q. Or did you call Staples and tell them either in the course of one of your purchases from Staples or just call them specifically for that purpose to say I don't want anything faxed to me?**

**A. Not that I recall.**

[Verdery Depo., Tr. pp. 20:4 to 20:7, 18:8 to 19:4, 16:10 to 16:22].

Plaintiff did not recall whether he had used any of the coupons faxed to him by Staples. [Verdery Depo., Tr. p. 22:4 to 22:10]. However, he did fully understand that by joining the Staples Business Rewards program, he was entering into a mutually beneficial relationship where he would earn rewards, in the form of refunds or gift certificates, based on his volume of continuing purchases at Staples:

**Q. What did you understand -- at the time you received a business rewards number, what did you understand the business rewards program to be?**

**A. It was some type of refund or gift certificate or something you got, best that I can recall, based on your volume of purchases or something to that effect.**

[Verdery Depo., Tr. p. 15:11 to 15:18].

3. Plaintiff's allegations.

This case is styled as a class action. Verdery alleges that he received a facsimile advertisement (the "Facsimile") in March 2003 from Staples which he claims he did not invite or permit. The Complaint states merely that the proposed lead Plaintiff, Mattison R. Verdery, C.P.A., P.C., received an "unsolicited" facsimile advertisement from Staples. [Complaint, ¶¶ 11-22]. The Complaint, however, neglects to mention the fact that Plaintiff had had an established business relationship with Staples for years before he received the facsimile advertisement and that he had, in fact, provided his facsimile number to Staples prior to his receipt of the facsimile.

Plaintiff's Complaint seeks the following relief under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, and various state law theories of liability:



- 1) Statutory damages of \$500 per facsimile and injunctive relief under the Telephone Consumer Protection Act for sending allegedly unsolicited facsimiles, 47 U.S.C. § 227;
- 2) Treble damages of \$1,500 per facsimile and injunctive relief for alleged willful violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227;
- 3) Damages for trespass to personal property (O.C.G.A. § 51-10-3);
- 4) Damages for conversion of personal property (O.C.G.A. § 44-12-150, et seq.);
- 5) Damages for nuisance (O.C.G.A. § 41-1-1, et seq.);
- 6) Punitive damages (O.C.G.A. § 51-12-5.1); and
- 7) Attorneys' fees (O.C.G.A. § 13-6-11).

[Complaint, Counts I through VIII].

4. There was no appreciable damage to either Plaintiff's facsimile machine, Plaintiff's employee time or Plaintiff's supplies as a result of Plaintiff's receipt of the Facsimile.

Plaintiff's Complaint seeks to recover, in addition to statutory damages under the TCPA, (a) loss of employee time, (b) depletion of toner, ink, ribbon cartridge and other electronic reproduction supplies, (c) loss of electricity, paper and other consumables, (d) wear and tear on his fax machine, (e) temporary loss of use of facsimile time, and (f) annoyance and aggravation. [Complaint, ¶¶ 43, 46, 49]. With regard to each category of damages sought, Verdery was not able to specify any damage caused by the Facsimile:

a. Loss of employee time.

With regard to his claim for lost employee time as a result of the Facsimile, Verdery stated that he did not know which employee retrieved the Facsimile from his machine:

**Q. Do you have personal knowledge as to what employee or employees in your office received the facsimile which is at issue in this litigation?**

A. We have one fax machine. So, all -- any fax would come there. And so -- and I only have four employees, five counting myself. So one of us. I don't recall exactly who.

[Verdery Depo., Tr. pp. 24:25 to 25:6].

Among the employees who might have retrieved the Facsimile, some were hourly employees with various hourly rates and some were salaried employees. [Verdery Depo., Tr. pp. 25:16 to 26:3, 26:20 to 27:24].

b. Depletion of toner, ink, ribbon cartridge and other electronic reproduction supplies.

With regard to his claim for depletion of toner, ink, ribbon cartridge and other electronic reproduction supplies, Verdery could not determine which toner cartridge had been used and how much this toner cartridge had cost as a whole. Therefore, he could not determine how much the Facsimile had cost in materials used:

**Q. And do you know how much you pay every year for toner for that fax machine?**

A. I don't recall. I mean, I don't --

**Q. Do you have any way of calculating how much this facsimile, how much toner this would have used and how much that would have cost you?**

A. No, I don't.

\* \* \*

**Q. Have you paid the same amount every time you bought a toner cartridge?**

A. I doubt if I paid the same amount every time.

\* \* \*

**Q. Would there be any way that you know of to trace exactly to which toner cartridge this came, facsimile came from?**

**A. Not that I know of.**

\* \* \*

**Q. And there would be no way to trace how much the toner this cost you as a result of this fax, correct?**

**A. Not an exact amount, right.**

[Verdery Depo., Tr. pp. 28:16 to 28:22, 29:4 to 29:7, 29:15 to 29:18, 29:23 to 30:1].

**c. Loss of electricity, paper and other consumables.**

With regard to his claim for loss of electricity, paper and other consumables, Verdery could not determine how much the Facsimile had cost him. He could not determine which package of paper had been used for the Facsimile, nor how much electricity had been used. Therefore, he could not determine how much the Facsimile had cost in materials used:

**Q. Have you paid the same amount every time you have bought paper?**

**A. I doubt it.**

**Q. Would there be any way to go back and trace to exactly which pack of paper this facsimile came from?**

**A. Not that I know of.**

\* \* \*

**Q. So, therefore, there would be no way to trace how much you paid for the pack of paper which this paper came from, correct?**

**A. Correct.**

\* \* \*

**Q. Do you know how much you pay every month for electricity?**

**A. Probably averages about \$100.**

**Q. Is it a flat rate or is it --**

A. No, it varies.

**Q. I assume that varies by the rate at which you are charged, as well as how much you use?**

A. That's -- yes.

[Verdery Depo., Tr. pp. 29:8 to 29:14, 29:19 to 29:22, 31:7 to 31:14].

d. Wear and tear on fax machine.

With regard to wear and tear on his facsimile machine, Verdery did not notice any change of condition as a result of the Facsimile nor has he measured any wear and tear on his facsimile machine:

**Q. What type of fax machine do you have?**

A. I think it's a Panasonic.

**Q. Do you remember when you bought that fax machine?**

A. Oh, man, it's probably eight years old.

\* \* \*

**Q. Do you have any way of measuring the wear and tear on your facsimile machine caused by this specific fax?**

A. I, myself, don't have any way of doing it. I don't know if the manufacturer has some way of knowing that.

**Q. Was this fax in any way the straw that broke the camel's back, and it blew up after this fax?**

A. The fax machine did not blow up.

**Q. Okay. As a result of this facsimile specifically, do you know of any condition in the fax machine which has resulted from this facsimile?**

A. Say that again.

**Q. Are you aware of any condition, change of condition in the facsimile machine as a result of this specific facsimile?**

A. No.

[Verdery Depo., Tr. pp. 30:6 to 30:18, 32:1 to 32:20].

e. Temporary loss of use of facsimile time.

With regard to his claim for temporary loss of use of facsimile time, Plaintiff was unable to determine whether any business was lost as a result of the Facsimile or whether any business was unable to reach him:

**Q. Is there any customer which you know of in connection with this specific facsimile which was not able to reach you at the time of this facsimile?**

A. Not that I know of, no.

[Verdery Depo., Tr. p. 31:22 to 31:25].

f. Annoyance and aggravation.

With regard to his claim for annoyance and aggravation, Verdery admitted that this facsimile caused him no particular inconvenience:

**Q. But do you remember anything that particularly caused you an inconvenience as a result of this fax?**

A. I don't recall.

[Verdery Depo., Tr. p. 31:3 to 31:6].

5. Staples and Quick Link relied on the FCC regulations declaring the transmission of facsimile advertisements to customers to be legal conduct.

At all times relevant hereto, prior to transmission of the Facsimile at issue here, Staples and Quick Link acted in reliance on the FCC regulations which allowed them to send facsimile advertisements to their existing customers. [Affidavit of Peter Howard].

**III. HISTORY OF THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

The Telephone Consumer Protection Act of 1991 ("TCPA"), contained at 47 U.S.C. § 227, was passed with the underlying legislative intent that it would not unduly interfere with established business relationships. The TCPA contains restrictions on autodialed telephone